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No. 565

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

BRAZOSPORT SAVINGS & LOAN ASSOCIATION, FORT BEND FEDERAL SAVINGS & LOAN ASSOCIATION, and GULFCOAST SAVINGS & LOAN ASSOCIATION, *Appellants*

v.

JIMMY PHILLIPS, AMERICAN SAVINGS & LOAN ASSOCIATION, J. M. FALKNER, BANKING COMMISSIONER OF TEXAS, ET AL., *Appellees*

On Appeal From The Supreme Court of Texas

APPELLEES' MOTION TO DISMISS OR AFFIRM

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v.

JIMMY PHILLIPS, AMERICAN SAVINGS & LOAN ASSOCIATION, J. M. FALKNER, BANKING COMMISSIONER OF TEXAS, ET AL., *Appellees*

On Appeal From The Supreme Court of Texas

APPELLEES' MOTION TO DISMISS OR AFFIRM

Appellees, J. M. FALKNER, Banking Commissioner of Texas, AMERICAN SAVINGS & LOAN ASSOCIATION, and the individual incorporators of that organization, pursuant to Rule 16 of the revised rules of this Court, move to dismiss the appeal or alternatively to affirm the decision and judgment of the Supreme Court of the State of Texas,

from which decision and judgment the instant appeal has been taken. This motion is based upon the following grounds:

(1) Appellants are attempting to attack the very statute upon which they rely for their own existence.

(2) No substantial federal question is presented in that

(a) Appellants were accorded due process and equal protection of the laws, and

(b) the statute upon which the complaint is based has been amended.

(3) In part the federal questions sought to be raised were neither timely nor properly raised.

(4) The judgment of the Supreme Court of the State of Texas rests upon adequate non-federal bases.

STATEMENT OF THE CASE

After a hearing on December 15, 1958, the Banking Commissioner of Texas on January 23, 1959, issued an order granting a charter to American Savings & Loan Association (Plaintiffs' Exhibit 20). Application therefor (Plaintiffs' Exhibit 15) had been filed by the persons who are the individual Appellees before this Court.

The then controlling statute, Article 881a-2, Vernon's Annotated Civil Statutes of the State of Texas, provided in part:

> "When any persons shall file a proposed charter or articles of agreement as is elsewhere herein provided, if it appears to the satisfaction of the Banking Commissioner of Texas that the minimum capital required

> has been paid in cash into the treasury of the association upon subscriptions for shares, the Banking Commissioner of Texas shall ascertain from the best sources at his command, and by such investigation as he may deem necessary, the expense of such investigation to be paid by the incorporators, whether the character, responsibility and general fitness of the persons named in the articles of incorporation are such as to command confidence and warrant belief that the business of the proposed building and loan association will be honestly and efficiently conducted in accordance with the intent and purpose of this Act, and whether the public convenience and advantage will be promoted by allowing such proposed building and loan association to be incorporated and engaged in business, and whether the population in the neighborhood of such place and in the surrounding country affords a reasonable promise of adequate support for the proposed building and loan association."[1]

Rules and regulations for savings and loan associations (Plaintiffs' Exhibit 6-b), adopted in compliance with Article 342-114, Vernon's Annotated Civil Statutes, authorizing the promulgation of "general rules and regulations not inconsistent with the Constitution and statutes of this state," permitted the Banking Commissioner, in passing upon applications for savings and loan associations, to hold hearings at which both applicants and protestants could present whatever evidence they chose.

Appellants, who had appeared at and participated in the American Savings & Loan application hearing before the

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[1] The statute has since been specifically repealed by and in the adoption of the Texas Savings & Loan Act (Acts, 1963, 58th Leg., Ch. 113, p. 269). The statute in full is reproduced in the appendix to this motion, as is the pertinent portion of the amendatory or new statute now in effect.

Banking Commissioner, filed suit in the 126th District Court of Travis County, Texas, seeking to set aside the Banking Commissioner's order approving the charter application. The then applicable statute, Article 881a-3, Vernon's Annotated Civil Statutes,[2] specifically provided for appeal only on behalf of those whose charter applications had been denied. No previous attempt had been made to review in the courts an order of the Banking Commissioner granting a savings and loan charter. The State, acting on behalf of the Banking Commissioner, took the position that the order was not appealable. The trial court and the Court of Civil Appeals entered judgments sustaining that position. *Brazosport Savings & Loan Association v. Phillips*, 326 S.W.2d 567 (Tex.Civ.App., 1959). The Supreme Court of Texas, however, reversed both of the lower courts, holding in *Brazosport Savings & Loan Association, et al. v. American Savings & Loan Association, et al.*, 161 Tex. 543, 342 S.W.2d 747 (1961), that the protesting savings and loan associations who are Appellants here were "entitled to an opportunity to prove their allegation that the Commissioner's action was illegal or without support in substantial evidence, and to appropriate relief if this be proved." No motion for rehearing was filed by either party, and the litigation from which this appeal is taken resulted.

The trial court hearing on the merits, in conformity with established Texas procedure governing appeals from administrative orders, provided a de novo review of all evidence in existence at the time the order of the banking

[2] That provision was also specifically repealed by the adoption of the new Texas Savings and Loan Act cited above.

Commissioner was issued.[3] Appellants were permitted to introduce in evidence a transcript of the hearing before the Banking Commissioner (Plaintiffs' Exhibit 21, Transcript, p. 163); the report of the investigator for the Banking Commissioner was made available to the Appellants and was also introduced in evidence (Plaintiffs' Exhibit 27, Transcript, p. 214); and Appellants were given unrestricted opportunity to introduce any and all evidence which they considered pertinent.

Stripped of its verbosity, Appellants' statement of the case to this Court (Jurisdictional Statement, pp. 16-26) reveals that Appellants purport to have been unable adequately to oppose the chartering of American Savings & Loan Association because (1) the data to be relied upon in support of the application was not filed with the agency prior to the administrative hearing, and (2) the report of the Banking Commissioner's own independent investigation of the application was not introduced in evidence at the administrative hearing.

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[3] In **Southern Canal Company v. State Board of Water Engineers**, 159 Tex. 227, 318 S.W.2d 619 (1958), the Supreme Court of Texas described review of an administrative order as "a type of de novo trial in that the evidence is heard anew and the reasonableness of the agency's action is independently adjudged by the court on the basis of evidence admitted in the judicial proceeding." Similarly in **Board of Water Engineers v. Colorado River Municipal Water District**, 152 Tex. 77, 254 S.W.2d 369 (1953), the Texas Supreme Court explained that in an appeal from an administrative order the trial court "makes an independent determination from the evidence adduced at the trial of whether the administrative order is reasonably supported by substantial evidence." This court denied certiorari, **Colorado River Municipal Water District v. Board of Water Engineers**, 346 U.S. 815, 74 S.Ct. 25, 98 L.Ed. 342 (1953). Comparable holdings include **Thomas v. Stanolind Oil & Gas Company**, 145 Tex. 270, 198 S.W.2d 420 (1946); **Trapp v. Shell Oil Company**, 145 Tex. 323, 198 S.W.2d 424 (1946); **Transport Company of Texas v. Robertson Transports**, 152 Tex. 551, 261 S.W.2d 549 (1953); **Davis v. City of Lubbock**, 160 Tex. 38, 326 S.W.2d 699 (1959).

Contrary to Appellants' inferences here, neither the then applicable statute, Article 881a-2, Vernon's Annotated Civil Statutes, nor Rule 2.1 of the Rules and Regulations required the filing of such data prior to the hearing. The rule (included in Plaintiff's Exhibit 6-b) reads:

> "2.1 When articles of incorporation of new associations are presented to the Banking Commissioner for his approval, such articles shall be accompanied by the proposed by-laws of the association and statements, exhibits, maps and other data properly verified, which shall be sufficiently detailed and comprehensive to enable the Commissioner to pass upon the proposed charter as to (1) the character, responsibility and general fitness of the persons named in the articles; (2) whether the public convenience and advantage will be promoted by allowing such proposed association to be incorporated and engaged in business, taking into consideration (a) that insurance of the accounts of the proposed association has been applied for and that such insurance will probably not be refused by the Federal Savings & Loan Insurance Corporation, (b) that such proposed association will have and maintain independent quarters with a ground-floor location or its equivalent, and (c) that such proposed association will have qualified full time management, and (d) the adequacy of the initial capital and surplus of the proposed association; and (3) whether the population of the neighborhood of such place and in the surrounding country affords a reasonable promise of adequate support for the proposed association."

The pertinent phraseology with regard to the time specified by the rule is "when the articles of incorporation of a new association are presented to the Banking Com-

missioner for his approval." The meaning of that phrase is made clear by other rules relating to new application procedure. Rule 2.2 directs the Commissioner "after the filing of a proper application" to set a date for hearing. Rule 2.3 specifies that the Commissioner shall notify the proposed incorporators at least five (5) days before the date set for the hearing whether or not a hearing will be held. If a hearing is to be held, that is the time when the articles of incorporation are *presented* to the Banking Commissioner for his approval and that, therefore, is the time specified by Rule 2.1 for the presentation of the supporting data. If no hearing is to be held, the articles of incorporation would be "presented to the Banking Commissioner for his approval" after notice of the fact that no hearing was to be held had been received.

The mere fact that Rule 2.2 uses the term "filing" while Rule 2.1 uses the phrase "when . . . presented to the Banking Commissioner for his approval" indicates that different times were intended by the two rules.

That construction is entirely logical. The "supporting data" is the evidence to be presented in behalf of the applicants. If the proceeding is to be adversary (that is, if other savings and loan associations give notice of an intention to protest and if a hearing is to be held), it would be most unreasonable to require the applicants to put all of their evidence in documentary form and give their adversaries advance notice of the precise facts which they intend to offer at the hearing.

The Supreme Court of the State of Texas in the decision here appealed, *Phillips v. Brazosport Savings & Loan Association*, ____ Tex. ____, 366 S.W.2d 929 (1963), clearly approved and accepted that construction saying:

> "The Commissioner testified at the trial that it has been his custom not to require the filing of this data if there was to be a hearing. Whether there was to be a hearing depended upon whether or not there were protestants who wished to challenge the granting of the charter. (Rule 2.3 of the Rules and Regulations) Since there was to be a hearing petitioners did not file accompanying data."

After quoting Article 881a-2, Vernon's Annotated Civil Statutes, the statute with which the rule was required to conform, the court continued:

> "The statutory mandate is that the Commissioner must find (1) that the character of the incorporators is satisfactory, (2) that the public convenience and advantage will be served by the granting of the charter and (3) that the population will support a building and loan association. The statute gives the Commissioner the power to ascertain [these facts] from the best sources at his command, and by such investigation as he may deem necessary. The statute nowhere requires that the Commissioner require the filing of this supporting data at the time of filing the articles of association. This rule is one which the Finance Commission has enacted for the convenience of the Banking Commissioner. The filing of this data merely provides the Banking Commissioner with another source of information. Nothing in the rule imports that its purpose is to acquaint a protestant with the evidence which an applicant is relying on. The Commissioner testified at the trial that his practice has been not to require the filing of the data when there is to be a hearing. He relies on the hearing and other sources of data necessary to a determination as to population, character, and public convenience and advantage. This interpretation of the rule is in

> harmony with the statute, since the statute gives him discretion to gather data from the best sources at his command."

Replying specifically to the precise contention which Appellants are seeking to raise in this Court, the Texas Supreme Court continued:

> "Respondents [Appellants here] contend that they have been deprived of their constitutional rights by the failure of petitioners to file the data, in that they were not able to properly prepare for the hearing, not knowing what evidence was to be offered by the applicants. This is untenable. In the first place, the rule does not provide that the data be filed before the hearing, but upon presentation to the Commissioner for approval. This could well mean at the hearing. In the second place, we can find no unfairness in the Commissioner's not requiring the filing of such data before the hearing was held because the respondents knew exactly who the incorporators were, they knew the town in which the association was to be located, and what the factual issues would be, since they are set out by the statute.
>
> "Respondents had ample opportunity after notice to prepare for the hearing. They knew that in order for the Commissioner to grant the charter he would have to be satisfied as the character of the incorporators, as to the public advantage and convenience for granting the charter, and that the population showed promise of sufficient support for the association. If one or more of the conditions could not be met, respondents had every opportunity of showing the necessary facts to the Commissioner."

Appellants' second ground of complaint is that the report of the investigator for the Banking Commissioner

was not introduced in evidence at the administrative hearing. In their review of the evidence (Jurisdictional Statement, page 21), Appellants conveniently omit reference to the fact that the field investigator's report (Plaintiff's Exhibit 27) is dated December 13, 1958, two days before the hearing and the further fact that the report shows on its face that R. C. Findlay, vice-president of Brazosport Savings & Loan Association, was one of the persons interviewed by the investigator and that he "registered objection" to the chartering of American Savings & Loan. That fact was in no way disputed by the Appellants. Moreover, Findlay himself testified that with regard to the American Savings & Loan application he was interested both in his own behalf "and in behalf of the other savings and loan associations who protested the application" (S.F. 69). In response to Appellants' contentions on this point in that court, the Supreme Court of Texas first noted that the then applicable statute, Article 881a-2, Vernon's Annotated Civil Statutes, did not require a hearing of any kind, that a long established Texas rule permitted administrative agencies to rely upon their own office records, and then, with specific application to the facts in evidence, held that:

> "Since the statute expressly authorizes the Commissioner to make an independent investigation and to rely on the results thereof in making his determination, respondents are charged with notice of the likelihood of such an investigation and report. Moreover, before the hearing, investigator Benson interviewed officers of two of the protesting building and loan associations, thus putting them on actual notice that the Commissioner was exercising his authority to make an independent investigation. Yet the respondents

> [Appellants] participated in the administrative hearing before the Commissioner without once demanding to see the data collected by the investigators."

Even more significant, however, than the fact that the Commissioner did not refuse to place the report in evidence at the administrative hearing is the further fact that, at the hearing on the merits in the trial court, the full report was introduced in evidence (Plaintiff's Exhibit 27). Not only did Appellants have ample opportunity, had they been able to do so, to refute any statement made in the investigator's report, but it is also abundantly clear that Appellants must have known the topics to be covered by the report. The report was necessarily limited to the matters which the statute, Article 881a-2, Vernon's Annotated Civil Statutes, required the Commissioner to investigate. Moreover, although Appellants, as plaintiffs in the trial court, offered evidence in opposition to the granting of the charter, they made no effort whatsoever to dispute any factual statement contained in the investigator's report.

APPELLANTS ATTACK THE STATUTE UPON WHICH THEY RELY FOR THEIR OWN EXISTENCE

Appellants identify as the statute brought into question by this appeal Article 881a-2, Vernon's Annotated Civil Statutes of the State of Texas. They fail to note, however, that the Appellants, Brazosport Savings & Loan Association and Gulf Coast Savings & Loan Association, were organized and attained their status as corporate bodies upon the authority of that same identical statute. They are, therefore, in the untenable position of both relying upon the statute for their own existence and attacking its con-

stitutionality in the creation of a competitive organization. It has long been established that a party cannot both assail and rely upon a statute in the same proceeding. *Hurley v. Commission of Fisheries of Virginia*, 257 U.S. 223, 42 S. Ct. 83, 66 L. Ed. 206 (1921). As this Court noted in *Frost v. Corporation Commission of the State of Oklahoma*, 278 U.S. 515, 49 S. Ct. 235, 73 L. Ed. 487 (1929), "it is not open to question that one who has acquired rights of property necessarily based upon a statute may not attack that statute as unconstitutional, for he cannot both assail it and rely upon it in the same proceeding."

Effort was made to avoid application of the rule in *Fahey, et al. v. Mallonee, et al.*, 332 U.S. 245, 255, 256, 67 S. Ct. 1552, 91 L. Ed. 2030 (1947), where stockholders rather than the association itself instituted the cause of action. This Court, however, refused to act on the basis of the subterfuge and instead applied the rule, saying:

> "This is a stockholder's derivative action in which plaintiffs sue only in the right of the Association. It is an elementary rule of constitutional law that one may not 'retain the benefits of the Act while attacking the constitutionality of one of its important conditions.' United States v. City and County of San Francisco, 310 U.S. 16, 29, 60 S.Ct. 749, 756, 84 L.Ed. 1050. As formulated by Mr. Justice Brandeis, concurring in Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 348, 56 S. Ct. 466, 483, 80 L.Ed. 688, 'The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits.'
>
> "In the name and right of the Association it is now being asked that the Act under which it has its existence be struck down in important particulars,

> hardly severable from those provisions which grant its right to exist . . . It would be difficult to imagine a more appropriate situation in which to apply the doctrine that one who utilizes an Act to gain advantages of corporate existence is estopped from questioning the validity of its vital conditions."

Upon the basis of that holding, this Court reversed the decision of the three-judge court below. The rule, as stated by Mr. Justice Brandeis in his concurring opinion in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 348, 56 S. Ct. 466, 80 L. Ed. 688 (1936), that "the court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits" is clearly applicable either to appeal or to application for certiorari. It is Appellees' position that it is directly in point in the case at bar.

THE FEDERAL QUESTIONS PRESENTED ARE NOT SUBSTANTIAL

Appellants assert that this proceeding presents four (4) federal questions which, stripped of Appellants' self-serving legal conclusions, may be briefly stated as:

(1) Whether Appellants, as existing savings and loan associations, were denied due process and equal protection of the laws in the conduct of the administrative hearing on the chartering of a competitive savings and loan association under the then established administrative procedure for the chartering of such organizations.

(2) Whether an order of the Banking Commissioner, subject to a complete judicial review of all determinative facts, violates the due process and equal protection clauses if the Banking Commissioner, as specifically authorized by

statute, relies, in issuing that order, on independent administrative investigation as well as upon evidence presented at a hearing on the application by both the applicants and the protestants.

(3) Whether Article 881a-2, Vernon's Annotated Civil Statutes of the State of Texas, in authorizing the Banking Commissioner of Texas to make independent investigation of savings and loan applications, is violative of the due process and equal protection clauses of the federal constitution.

(4) Whether judicial review under the substantial evidence rule, including a de novo consideration of all pertinent facts in existence at the time of the issuance of the order, afforded Appellants due process and equal protection of the laws.

When the above questions are considered in the light of the foregoing statement of the case, however, it is apparent that in reality only one question is raised. That question is whether Appellants were accorded procedural due process and were given equal protection of the laws in their efforts to protest and to set aside an order of the Banking Commissioner granting a charter to a competitive savings and loan association.

(a) Appellants have been accorded due process and equal protection of the laws.

The term, "due process of law," has "never been one of fixed and invariable content." *Federal Communications Commission v. WJR, the Goodwill Station*, 337 U.S. 265, 275, 69 S. Ct. 1097, 93 L. Ed. 1353 (1949). It "guarantees no particular form of procedure." *National Labor Re-*

lations Board v. Mackey Radio & Telegraph Company, 304 U.S., 333, 351, 58 S. Ct. 904, 82 L. Ed. 1381 (1938). The requirements of due process frequently vary with the type of proceeding involved. *Hannah v. Larche*, 363 U.S. 420, 442, 80 S. Ct. 1502, 4 L. Ed. 2d 1307 (1960), rehearing denied 364 U.S. 420, 81 S. Ct. 33, 5 L. Ed. 2d 79 (1960). In *Anderson National Bank v. Luckett*, 321 U.S. 233, 246, 64 S. Ct. 599, 88 L. Ed. 692, 151 A.L.R. 824 (1944), this Court said:

> "What is due process in a procedure affecting property interests must be determined by taking into account the purposes of the procedure and its effect upon the rights asserted and all other circumstances which may render the proceeding appropriate to the nature of the case."

Appellants, as existing savings and loan associations, have only "local franchises" which "while having elements of property, confer no contractual or property right to be free of competition." *Tennessee Electric Power Company v. Tennessee Valley Authority*, 306 U.S. 118, 139, 59 S. Ct. 366, 83 L. Ed. 543 (1939). Appellants assert reliance upon *Frost v. Corporation Commission of Oklahoma*, 278 U.S. 515, 49 S. Ct. 235, 73 L. Ed. 483 (1929), but they failed to bring themseves within the rule there applied. In discussing that decision, this Court in *Alabama Power Company v. Ickes*, 302 U.S. 464, 484-485, 58 S. Ct. 300, 82 L. Ed. 374 (1938), explained:

> "Frost v. Corporation Commission, 278 U.S. 515, 49 S. Ct. 235, 73 L. Ed. 483, relied upon by petitioner, presents an altogether different situation. Appellant there owned a cotton-ginning business in the city of

> Durant, Okl., for the operation of which he had a license from the Corporation Commission. The law of Oklahoma, Comp. Laws 1921, § 3713 [17 Okl. St. Ann. § 42], provided that no gin should be operated without a license from the commission, which could be obtained only upon specified conditions. We held that such a license was a franchise constituting a property right within the protection of the Fourteenth Amendment; and that while the acquisition of the franchise did not preclude the state from making similar valid grants to others, it was exclusive against an attempt to operate a competing gin without a permit or under a void permit. The Durant Co-operative Gin Company sought to obtain a permit from the commission which, for reasons stated in our opinion, we held would be void and a clear invasion of Frost's property rights. We concluded that a legal right of Frost to be free from such competition would be invaded by one not having a valid franchise to compete, and sustained Frost's right to an injunction against the commission and the Durant company. See Corporation Commission v. Lowe, 281 U.S. 431, 435, 50 S.Ct. 397, 398, 74 L.Ed. 945. The difference between the Frost Case and this is fundamental; for the competition contemplated there was unlawful while that of the municipalities contemplated here is entirely lawful."

The above holding makes it abundantly clear that one seeking to protect itself from competition has the burden of establishing the illegality or absence of legality of the proposed competition. Appellants have not sustained that burden. Neither have they shown that in any way they were treated differently from any other standing in the same position. As this Court noted in *Morey v. Doud*, 354 U.S. 457, 463, 77 S.Ct. 1344, 1 L.Ed.2d 1485 (1957), the "established proposition" is that the "prohibition of the

Equal Protection Clause goes no further than the invidious discrimination," and that one who assails a state law on the ground that it violates the Equal Protection Clause of the Fourteenth Amendment "must carry the burden of showing that it does not rest upon any reasonable basis but is essentially arbitrary."

The asserted federal questions indicate that Appellants' attack on both constitutional grounds is directed at four (4) stages or incidents in the chartering of American Savings & Loan Association: (1) the administrative hearing, (2) the independent administrative investigation, (3) the controlling statute, and (4) the judicial review.

With regard to the administrative hearing, it is undisputed that Appellants received notice, appeared (S.F. 143-144) and were given an opportunity to and did present evidence (Transcript of the hearing before the Banking Commissioner, Plaintiffs' Exhibit 21). In *Anderson National Bank v. Luckett*, 321 U.S. 233, 244, 64 S. Ct. 599, 88 L. Ed. 692, 151 A.L.R. 824 (1944), this Court said:

> "The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked. If that is preserved, the demands of due process are fulfilled."

Appellants do not challenge the Banking Commissioner's testimony that the hearing was conducted in the customary manner (S.F. 145-156, 162). Their complaints are only that the applicants for charter did not file their supporting data or evidence prior to the hearing and that the report of the independent investigator for the Banking Commissioner was not introduced in evidence. The Bank-

ing Commissioner did not construe the rules as requiring either that the evidentiary matter be filed prior to the hearing or that the results of his independent investigation be placed in evidence at the hearing (S.F. 100, 110).

The Texas Supreme Court in the decision here subject to appeal approved and adopted the Banking Commissioner's construction of the rules. The construction of a state statute or rule promulgated in compliance with a statute by a state supreme court is binding upon this Court. *United States v. Burnison*, 339 U.S. 87, 70 S. Ct. 503, 94 L. Ed. 675 (1950). Since Appellants' first question is grounded solely upon their own construction of the rules, which is contrary to the construction given the rules by the state Supreme Court, no substantial federal question is presented. *Black v. Cutler Laboratories*, 351 U.S. 292, 76 S. Ct. 824, 100 L. Ed. 1188, rehearing denied 752 U.S. 859, 77 S. Ct. 21, 1 L. Ed. 2d 69 (1956). Moreover, Appellants' position is clearly contrary to this Court's holding in *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886, 894, 81 S. Ct. 1743, 6 L.Ed. 2d 1230 (1961), rehearing denied 368 U.S. 869, 82 S. Ct. 22, 7 L. Ed. 2d 70 (1962), where, with specific regard to administrative action, it was explained that due process "does not require a trial type hearing in every conceivable case of government impairment of private interest."

The above noted principle is particularly applicable here since the trial on the merits provided a complete review of all evidence, including the investigator's report.

Appellants' second asserted federal question overlaps the first in that it is directed at the use of the investigator's report. Moreover, the second question cannot properly be

considered independently of the statute which authorized the investigation, Article 881a-2, Vernon's Annotated Civil Statutes, which is the subject of Appellants' third asserted question.

With regard to the investigation, the Banking Commissioner testified that he presumed that "everybody, protestant and applicants both, were cognizant of the fact that an investigation had been made" (S.F. 110). Clearly there was abundant reason for his presumption. The then applicable statute not only authorized but required the Banking Commissioner to "ascertain from the best sources at his command and by such investigation as he may deem necessary" the various matters to be determined in the granting of a savings and loan application. The use of such investigations was an established procedure of the banking department on applications for either state-chartered banks or savings and loan associations. *Falkner v. Gibraltar Savings & Loan Association*, 348 S.W. 2d 467 (Tex. Civ. App., 1961, writ refused, n.r.e.); *Falkner v. Gibraltar Savings & Loan Association*, 348 S.W. 2d 472 (Tex. Civ. App., 1961, writ refused, n.r.e.); *Farb v. State Banking Board*, 343 S.W. 2d 508 (Tex. Civ. App., 1961, writ refused, n.r.e.). Moreover, with regard to administrative matters in general, the courts of the State of Texas have long and consistently held that the agencies are not confined to evidence actually brought out at a hearing but may rely upon information disclosed by their own office records. *Railroad Commission v. McDonald*, 90 S.W. 2d 581 (Tex. Civ. App., 1936); *Northeast Texas Motor Lines v. Texas & Pacific Motor Transport Company*, 159 S.W. 2d 926 (Tex. Civ. App., 1941); *Texas Industrial Traffic League v. Railroad Commission*, 255 S.W. 2d 903 (Tex.

Civ. App., 1953, writ refused, n.r.e.); *Alamo Express v. Union City Transfer*, 158 Tex. 234, 309 S.W. 2d 815 (1958). In *Anderson National Bank v. Luckett*, 321 U.S. 233, 244, 64 S. Ct. 599, 88 L. Ed. 692, 151 A.L.R. 824 (1944), this Court noted that:

> "The fact that a procedure is so old as to have become customary and well known in the community is of great weight in determining whether it conforms to due process, for 'Not lightly vacated is the verdict of quiescent years'. Coler v. Corn Exchange Bank, 250 N.Y. 136, 141, 164 N.E. 882, 884, 65 A.L.R. 879, affirmed sub nom. Corn Exchange Bank v. Coler, Commissioner, supra. To that effect, see Otis Co. v. Ludlow Mfg. Co., 201 U.S. 140, 154, 26 S. Ct. 353, 355, 50 L. Ed. 696; Ownbey v. Morgan, 256 U.S. 94, 108, 109, 112, 41 S. Ct. 433, 437, 438, 65 L. Ed. 837, 17 A.L.R. 873; Jackman v. Rosenbaum Co., 260 U.S. 22, 31, 43 S. Ct. 9, 10, 67 L. Ed. 107; Corn Exchange Bank v. Coler, Commissioner, supra, 280 U.S. at pages 222, 223, 50 S. Ct. at page 95, 74 L.Ed. 378; Snyder v. Commonwealth of Massachusetts, 291 U.S. 97, 110, 111, 54 S. Ct. 330, 334, 78 L. Ed. 674, 90 A.L.R. 575."

In situations far more comparable with the facts in the case at bar than revealed in any of the decisions cited by Appellants, it has repeatedly been held that consideration of matters not specifically introduced in evidence at an administrative hearing does not constitute a denial of due process. For example in *Starr v. Fleming*, 159 F. 2d 867 (Em. Ct., 1947), the court held that a protestant was not denied due process in a protest proceeding because the price administrator incorporated an affidavit into the record of proceedings without giving the protestant an opportunity to rebut it.

Again, in *National Labor Relations Board v. Botney Worsted Mills*, 106 F. 2d 263 (3rd Cir., 1939), the court held that the action of the National Labor Relations Board in hearing ex parte a person who had not acted as counsel before the trial examiner and was not connected with the prosecution of the case was not a denial of due process.

Even more comparable to the case at bar is *American & European Agencies v. Gilliland*, 247 F. 2d 95 (U. S. Ct. App., D.C., 1957), certiorari denied 355 U.S. 884, 78 S. Ct. 152, 2 L. Ed. 2d 114 (1957). There, as in the case at bar, a hearing was held, but a staff memorandum considered by the Commission was not offered in evidence. In holding that the use of the memorandum did not constitute a denial of due process, the court distinguished two of the cases upon which Appellants here rely, saying:

> "*Appellant concedes that it was accorded a hearing* in which it had opportunity to present its views and to offer evidence to support the merits and proper valuation of its claim. Its assertion is that the constitutional right to a hearing includes the right to know and meet the claims of the opposing party, citing Morgan v. United States, 1938, 304 U.S. 1, 58 S.Ct. 773, 999, 82 L.Ed. 1129, and Ohio Bell Telephone Co. v. Public Utilities Commission, 1937, 301 U.S. 292, 57 S. Ct. 724, 81 L. Ed. 1093, and that here *it was not furnished a staff memorandum on which the Commission relied in making its determination of value.* It says that the Commission should have accorded it a further hearing wherein it could offer evidence designed to rebut the conclusions of the memorandum. The cited cases established the requirements of a fair hearing in situations where a governmental agency was affirmatively acting to the detriment of the complaining party by fixing maxi-

> mum rates (Morgan) or by lowering rates and ordering the complainant to make refunds (Ohio Bell Telephone). The Foreign Claims Settlement Commission is not engaged in that kind of task; . . . while it is perhaps true that some minimal form of hearing is necessary even for the performance of . . . a governmental function, *due process in these circumstances surely does not require more than an opportunity for the claimant to be heard.* Appellant concedes it was accorded this much." (Emphasis added)

In noting the applicability of the above holding to the instant case, it should be recalled that Appellants' sole interest in the proceedings here in question is their desire to prevent the operation of a competive savings and loan association. "What procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895, 81 S. Ct. 1743, 6 L. Ed. 2d 1230 (1961), rehearing denied 368 U.S. 869, 82 S.Ct. 22, 7 L.Ed.2d 70 (1962).

Moreover, in the instant case only specific statutory issues controlling the granting of savings and loan applications could have been involved in the investigation. Knowing those issues, Appellants obviously could introduce any evidence which they considered pertinent. "Due process of law is afforded where there is opportunity to be heard before the body which makes the assessment [or decision], and the Legislature of a state may provide that such hearing shall be conclusive so far as the Federal Constitution is concerned." *Hibben v. Smith*, 191 U.S. 310, 24 S. Ct. 88, 48 L. Ed. 195 (1903). Appellants not only

appeared and offered evidence at the administrative hearing, but they were granted an opportunity to subject the decision of the Banking Commissioner to judicial review. That review, despite the fact that it is the subject of Appellants' last asserted question, conclusively establishes that all possible requirements of due process and equal protection were afforded. Directly in point is this Court's explanation in *Anderson National Bank v. Luckett*, 321 U.S. 233, 246-247, 64 S. Ct. 599, 88 L. Ed. 692, 151 A.L.R. 824 (1944):

> ". . . it is not an indispensable requirement of due process that every procedure affecting the ownership or disposition of property be exclusively by judicial proceeding. Statutory proceedings affecting property rights, which, by later resort to the courts, secure to adverse parties an opportunity to be heard, suitable to the occasion, do not deny due process. Familiar examples are the decisions and orders of administrative agencies which determine rights subject to a subsequent judicial review."

Similarly in *Ewing v. Mytinger & Casselberry*, 339 U.S. 594, 599, 70 S.Ct. 870, 94 L.Ed. 1088 (1950), rehearing denied, 340 U.S. 857, 71 S.Ct. 69, 95 L.Ed. 627 (1950), this Court, citing earlier holdings on the same point, said:

> ". . . it is not a requirement of due process that there be judicial inquiry before discretion can be exercised. It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination. Phillips v. Commissioner of Internal Revenue, 283 U.S. 589, 596-597, 51 S.Ct. 608, 611, 75 L.Ed. 1289; Bowles v. Willingham, 321 U.S. 503, 520, 64 S.Ct. 641, 650, 88 L.Ed. 892; Yakus v. United States, 321 U.S. 414, 442-443, 64 S.Ct. 660, 675, 676, 88 L.Ed. 834."

Apparently in recognition of that conclusively established rule, Appellants seek to attack the type of review which they were accorded in the Texas courts, but, contrary to Appellants' inferences and designation of "limited," the substantial evidence rule as applied in the courts of this jurisdiction provides a more, rather than a less, extensive review than is normally accorded administrative orders. In explaining the Texas practice, the Supreme Court of the State in *Jones v. Marsh*, 138 Tex. 326, 224 S.W.2d 198, 202 (1949), said:

> "Stating again the substantial evidence rule, it is that the finding of the administrative body or agency will be sustained by the court if it is reasonably supported by substantial evidence, *meaning evidence introduced in court.* It is for the court, whether trial or appellate, to determine as a matter of law the reasonableness of the support afforded by substantial evidence, and in making its decision of this question the court examines and takes into consideration all of the evidence." (Emphasis added)

In Texas the trial court has the duty of evaluating the evidence. *Board of Firemen's Relief & Retirement Fund v. Marks*, 150 Tex. 433, 224 S.W.2d 181, 27 A.L.R. 2d 965 (1951). Determination is made by "a review of the entire record after a full and final hearing in the trial court." *Transport Company of Texas v. Robertson Transports*, 152 Tex. 551, 261 S.W.2d 549 (1953). All "evidence is heard anew." *Southern Canal Company v. State Board of Water Engineers*, 159 Tex. 227, 318 S.W.2d 619 (1959).

Obviously review of that type is in complete contrast with the proceedings which this Court condemned in *Ohio Bell Telephone Company v. Public Utilities Commission of Ohio*, 301 U.S. 292, 57 S.Ct. 724, 81 L.Ed.

1093 (1937), one of the major cases relied upon by Appellants here. In describing the facts there before it, this Court in that case noted (301 U.S. 300):

> "The company . . . asked disclosure of the documents indicative of price trends, and an opportunity to examine them, to analyze them, to explain and to rebut them. The response was a curt refusal. Upon the strength of these unknown documents refunds have been ordered for sums mounting into millions, the Commission reporting its conclusion, but not the underlying proofs. *The putative debtor does not know the proofs today.*" (Emphasis added)

At another point in the same opinion, it was further explained that (301 U.S. 302-303):

> "Not only are the facts unknown; there is no way to find them out. When price lists or trade journals or even government reports are put in evidence upon a trial, the party against whom they are offered may see the evidence or hear it and parry its effect. Even if they are copied in the findings without preliminary proof, there is at least an opportunity in connection with a judicial review of the decision to challenge the deductions made from them. The opportunity is excluded here. The Commission, withholding from the record the evidential facts that it has gathered here and there, contents itself with saying that in fathering them it went to journals and tax lists . . ."

Such facts are in no way comparable with those now before the court. Appellants in the case at bar were provided with the investigator's report which is the basis of their complaint; it was introduced in evidence at the trial (Plaintiff's Exhibit 27) and is now before this court. In conformity with established Texas practice, both Appellants

as Plaintiffs and Appellees as defendants in the trial court were given a full and complete opportunity to introduce or to rebut any matter which might have been considered in arriving at the order in question. Upon the basis of that complete hearing in the trial court, the Supreme Court of Texas entered the judgment which is the subject of this appeal. In that respect also the review in the case at bar is markedly different from that accorded in the *Ohio Bell* case, which this Court described as (301 U.S. 303-304):

> ". . . under the statutes of Ohio no provision is made for a review of the order of the Commission by a separate or independent suit . . . A different question would be here if such a suit could be maintained with an intermediate suspension of the administrative ruling . . . In Ohio the sole method of review is by petition in error to the Supreme Court of the State, which considers both the law and the facts upon the record made below [at the administrative hearing] *and not upon new evidence*. In such circumstances judicial review would be no longer a reality if the practice followed in this case were to receive the stamp of regularity. To put the problem more concretely: how was it possible for the appellate court to review the law and the facts and intelligently decide that the findings of the Commission were supported by the evidence when the evidence that it approved was unknown and unknowable? . . . What the Supreme Court of Ohio did was to take the word of the Commission as to the outcome of a secret investigation, and let it go at that. 'A hearing is not judicial, at least in any adequate sense, unless the evidence can be known.'"

Thus, in pointing out the defects in the Ohio procedure, this Court, at least by inference if not expressly, approved the precise type of review which the Appellants were

accorded in the Texas courts. Even more conclusive of approval of the Texas procedure is *Pacific Livestock Company v. Lewis*, 241 U.S. 440, 36 S.Ct. 637, 60 L.Ed. 1084 (1916). The statute there in question dealt with administrative control of water rights. Federal questions were raised on the basis of the statute's permitting the agency to base its ruling both upon ex parte affidavits of claimants and upon the report of its own engineer. In holding that there was no violation of due process, this court noted that the agency order was subject to judicial review, that the trial court in such review proceedings was authorized to take "further evidence" and to "re-examine the whole matter," and that an appeal from the trial court's decree could be taken to the Supreme Court of the State. In response to the Appellants' contentions of violations of the Fourteenth Amendment on the basis of the ex parte affidavits and the use of the administrative officer's report, this Court ruled:

> ". . . while it is true, according to the concessions at the bar, that the sworn statements of claims are taken ex parte in the first instance, it also is true that they are then opened to public inspection, that opportunity is given for contesting them, and that, upon the hearing of the contests, full opportunity is had for the examination of witnesses, including those making the statements, and for the production of any evidence appropriate to be considered. Thus the fact that the original statements are taken ex parte becomes of no moment. And while it is true that the state engineer's report is accepted as evidence, although not sworn to by him, it also is true that the measurements and examinations shown therein are made and reported in the discharge of his official duties and under the sanction of his oath of office . . . Considering the nature of the report, and that claimants may oppose

it with other evidence, it is plain that its use as evidence is not violative of due process."[4]

Appellants in the case at bar have had an equal opportunity to contest the application of American Savings & Loan and to oppose the report of the investigator for the Banking Commissioner.

That judicial review of administrative orders in Texas may in some aspects differ from that in other jurisdictions does not even indicate a deprivation of constitutional rights. "The Federal Constitution does not prevent the states from determining on due notice an opportunity to be heard by what process legal rights may be asserted or legal obligations enforced." *Gelfert v. National City Bank of New York*, 313 U.S. 221, 235, 61 S.Ct. 898, 85 L.Ed. 1299 (1941).

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[4] Among other holdings in point see **St. Joseph's Stock Yards Company v. United States**, 298 U.S. 38, 56 S.Ct. 720, 80 L.Ed. 1033 (1936); **New Hampshire Fire Insurance Company v. Murray**, 107 F.2d 212 (7th Cir., 1939); and **Victor v. Porter**, 157 F.2d 769 (Em.Ct., 1946), certiorari denied 329 U.S. 801, 67 S.Ct. 491, 91 L.Ed. 684 (1947).

[5] Appellants' contention that the substantial evidence rule places "an impossible burden" upon those seeking to set aside an administrative order is provably without merit. The article, "The Trial of Administrative Appeals," in 26 Texas Bar Journal 731, 793-794 (September 22, 1963), specifically refutes the quoted statement: ". . . it is not impossible; compare the two Gibraltar Savings Association cases at 348 S.W.2d 467 and 348 S.W.2d 472 (both Aus.Civ.App., 1961, writ ref'd n.r.e.), where the court on the one hand found that there was substantial evidence to support the Banking Commissioner's denial of Gibraltar's downtown Houston branch, but on the other hand found that there was no substantial evidence to support the Commissioner's denial of Gibraltar's Northshore Houston branch. In a third Gibraltar Savings Association case, decided July 24, 1963, 6 S.Ct. J. 622, the Supreme Court reversed the Austin Court of Civil Appeals, and held that there was no substantial evidence to support the Commissioner's denial of Gibraltar's Smith-Hofheinz Houston branch.

"During the period from September 1961, through December 1962, a total of 134 appeals from administrative orders were filed in the three district courts of Travis County. During this same period of time, judgment was rendered in thirteen cases. Of these thirteen cases which were tried, the state agency's order was overruled in seven and upheld in six."

"The State is entitled to determine the procedure of its courts so long as it provides the requisite due process." *United Gas Public Service Co. v. State of Texas*, 303 U.S. 123, 140, 58 S.Ct. 483, 82 L.Ed. 702 (1938).

In a per curiam opinion dismissing appeal, this Court in *Martin v. Walton*, 368 U.S. 25, 82 S.Ct. 1, 7 L.Ed.2d 5 (1961), said (368 U.S. 25-26):

> "The appeal is dismissed for want of a substantial federal question. Upon plenary consideration, we are satisfied that, both on their face and as applied to appellants, Kan.Gen.Stat., 1949, sec. 7-104, and amended Kans. Sup. Ct. Rules 41 and 54 promulgated by the Supreme Court of Kansas, acting within its competence under state law, are not beyond the allowable range of state action under the Fourteenth Amendment . . . We cannot disregard the reasons given by the Kansas Supreme Court for the Rules in question. 187 Kan. 473, 357."

Appellees submit that the same ruling is equally applicable to the case at bar.

(b) The statute upon which the complaint is based has been repealed.

Completely independent of the considerations discussed above, the additional fact that the statute here in question has been repealed and that the new savings and loan act providing different procedures has been adopted conclusively establishes that the instant appeal fails to present any substantial federal question.[6]

A comparable situation was before this court in *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955), where this Court in dis-

[6] The pertinent portions of the new act are reproduced in the Appendix.

missing writ of certiorari as improvidently granted said (349 U.S. 73):

> "In our consideration of this petition our attention has now been focused upon an Iowa statute enacted since the commencement of this litigation. Though it was in existence at the time the case first came here, it was then not seen in proper focus because blanketed by the issues of 'state action' and constitutional power for which our interest was enlisted. This Iowa statute bars the ultimate question presented in this case from again arising in that State."

Appellants here concede (Jurisdictional Statement, pages 33 and 34) that the new Texas Savings & Loan Act will prevent recurrence of the matters of which they complain and that this appeal is brought solely for the benefit of the appellants themselves. They have, therefore, in effect admitted that this case does not merit consideration by the Supreme Court of the United States.

In the *Rice* case, this Court further explained:

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants."

The same rule was recently applied in *Rudolph v. United States*, 370 U.S. 269, 82 S.Ct. 1277, 8 L.Ed.2d 484 (1962), and is directly in point in the case at bar.

IN PART THE FEDERAL QUESTIONS SOUGHT TO BE RAISED WERE NEITHER TIMELY NOR PROPERLY RAISED

Insofar as Appellants seek to attack the application of the substantial evidence rule to judicial review of the

Banking Commissioner's order approving the application of American Savings & Loan Association, the question was not timely raised. Appellees do not concede, but instead expressly deny, that a substantial federal question could exist in this regard. Even, however, if there were any merit in the contentions, Appellants are foreclosed from presenting such question.

It will be recalled that the State of Texas initially took the position that an order of the Banking Commissioner approving a savings and loan application was not appealable. Appellants, urging the same federal questions of due process and equal protection, secured from the Supreme Court of the State of Texas a decision, *Brazosport Savings & Loan Association, et al v. American Savings & Loan Association, et al*, 161 Tex. 543, 342 S.W.2d 747 (1961), granting them "an opportunity to prove their allegations that the Commissioner's action was illegal or without support in substantial evidence."

Appellants, as petitioners in the Supreme Court of Texas had, in effect, sought judicial review under the substantial evidence rule. Moreover, after the Supreme Court of Texas unequivocally directed that judicial review be under the substantial evidence rule, Appellants made no protest with regard to that directive. No motion for rehearing whatsoever was filed by either party.

It is elementary that a constitutional question must be raised at the earliest opportunity or it will be considered as waived. 16 C.J.S. 340, Constitutional Law, §96. In *Pierce Oil Corporation v. Phoenix Refining Company*, 259 U.S. 125, 128-129, 42 S.Ct. 440, 66 L.Ed. 855 (1922), this Court noted:

> "There is nothing in the nature of such a constitutional right as is here asserted to prevent its being waived or the right to claim it barred, as other rights may be, by deliberate election or by conduct inconsistent with the assertion of such a right. Pierce v. Somerset Railway Co., 171 U.S. 641, 658, 19 Sup. Ct. 64, 43 L.Ed. 316; Wall et al. v. Parrot Silver & Copper Mining Co., 244 U.S. 407, 411, 37 Sup.Ct. 609, 61 L.Ed. 1229."

Indisputably Appellants had an opportunity to seek modification of that decision. Having failed to do so they have no basis for a complaint that the decision was unconstitutional. *Milheim v. Moffat Tunnel Improvement District*, 262 U.S. 701, 43 S.Ct. 694, 67 L.Ed. 1194 (1923). Even in criminal cases a constitutional right may be forfeited by failure to make timely assertion of the right. *Michel v. State of Louisiana*, 350 U.S. 91, 76 S.Ct. 158, 100 L.Ed. 83 (1955), rehearing denied 350 U.S. 955, 76 S.Ct. 340, 100 L.Ed. 831 (1955); *Yakus v. United States*, 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834 (1944); *Hawk v. Olson*, 326 U.S. 271, 66 S.Ct. 116, 90 L.Ed. 61 (1945).

Of further significance is the fact that an administrative order, subject to review under the substantial evidence rule, was before the Supreme Court of Texas in *Board of Water Engineers v. Colorado River Municipal Water District*, 152 Tex. 77, 254 S.W.2d 369 (1953). In describing the rule, which is precisely as it was applied in the case at bar, the court there said:

> "Under the rule the court makes an independent determination from the evidence adduced at the trial of whether the administrative order is reasonably supported by substantial evidence. The statute provides that the court shall determine the reasonableness of the order. If an order is reasonably supported by

> substantial evidence it is reasonable; otherwise it is unreasonable."

This court's denial of certiorari, 346 U.S. 815, 74 S.Ct. 25, 98 L.Ed. 342 (1954), is indicative of the fact that the question which Appellants here seek to raise has previously been before this Court and found to be without merit.

THE JUDGMENT CAN BE SUSTAINED UPON AN INDEPENDENT STATE GROUND

The only matter involved in this litigation is the Banking Commissioner's approval of the charter application of American Savings & Loan Association. Completely independent of the federal questions which Appellants raised in that court and seek to raise in this court, the Supreme Court of Texas held that the Banking Commissioner's order was supported by substantial evidence. The then applicable statute, Article 881a-2, Vernon's Annotated Civil Statutes, specifically provided for the issues to be determined in such situations. The same topics for consideration were substantially repeated in Rule 2.1 (Plaintiffs' Exhibit 6-b).

Upon the basis of the evidence submitted to the trial court, the Supreme Court of Texas ruled that the order was reasonably supported by substantial evidence and was not arbitrary. The testimony sustaining that conclusion is summarized in the Court's opinion from which this appeal is taken and is abundantly substantiated by the record here before this Court. Completely independent of any federal issue, that ruling sustains the judgment here attacked. In *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 56 S.Ct. 466, 80 L.Ed. 683 (1936), Mr. Justice Brandeis in his concurring opinion (297 U.S. 288, 347), in speaking of this Court's jurisdiction, pointed out that:

> "The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter. Siler v. Louisville & Nashville R. Co., 213 U.S. 175, 191, 29 S.Ct. 451, 53 L.Ed. 753; Light v. United States, 220 U.S. 523, 538, 31 S.Ct. 485, 55 L.Ed. 570. Appeals from the highest court of a state challenging its decision of a question under the Federal Constitution are frequently dismissed because the judgment can be sustained on an independent state ground. Berea College v. Kentucky, 211 U.S. 45, 53, 29 S.Ct. 33, 53 L.Ed. 81."

Although Appellees do not concede but instead expressly deny that any substantial federal question has been raised in the instant case, the above noted, consistently followed rule would alone and in itself provide abundant ground for Appellees' present motion to dismiss. Appellants were unsuccessful in their effort to secure from the courts of the State of Texas findings of fact contrary to those made by the Banking Commissioner. By their appeal to this Court, Appellants, in essence and effect, seek only to relitigate those factual questions. To grant them such a second opportunity would be contrary to this Court's holding in *Alabama Public Service Commission v. Southern Ry. Co.*, 341 U.S. 341, 348-349, 71 S.Ct. 762, 95 L.Ed. 1002 (1951), where it was held that:

> "And, whatever the scope of review of Commission findings when an alleged denial of constitutional rights is in issue, it is now settled that a utility has no right to relitigate factual questions on the ground that con-

stitutional rights are involved. State of New York v. United States, 1947, 331 U.S. 284, 334-36, 67 S.Ct. 1207, 1233, 1234, 91 L.Ed. 1492; Railroad Commission of Texas v. Rowan & Nichols Oil Co., 1941, 311 U.S. 570, 576, 61 S.Ct. 343, 346, 85 L.Ed. 358."

CONCLUSION

The judgment of the Supreme Court of Texas is adequately supported by independent state grounds. The Appellants have presented no substantial federal question; they not only seek to attack the very statute upon which they rely for their own existence, but they also concede that that statute has been repealed and that the matters of which they complain could not again arise. The appeal does not merit this court's consideration.

Respectfully submitted,

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PROOF OF SERVICE

I, HOWARD W. MAYS, one of the attorneys for J. M. FALKNER, Banking Commissioner of Texas, Appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the ____ day of December, 1963, I served copies of the foregoing Motion to Dismiss this appeal or, alternatively, to affirm the judgment of the Supreme Court of the State of Texas, including the Appendix attached to such Motion, on the several parties who are Appellants herein, in compliance with Paragraph 1 of Rule 33 of the Rules of this Court, by depositing copies in the United States Mail, with first-class postage prepaid, addressed to counsel of record for Appellants as follows: John J. McKay, 703 Perry-Brooks Building, Austin, Texas; R. W. Lindsey, Rosenburg, Texas; and Peareson, Sherer & Roberts, Richmond, Texas.

HOWARD W. MAYS
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An Attorney For One of the Appellees

APPENDIX

Article 881a-2, Vernon's Annotated Civil Statutes of the State of Texas (Acts 1929, 41st Leg., 2nd C. S., p. 100, ch. 61, § 2).

When any persons shall file a proposed charter or articles of agreement as is elsewhere herein provided, if it appears to the satisfaction of the Banking Commissioner of Texas that the minimum capital required has been paid in cash into the treasury of the association upon subscriptions for shares, the Banking Commissioner of Texas shall ascertain from the best sources at his command, and by such investigation as he may deem necessary, the expense of such investigation to be paid by the incorporators, whether the character, responsibility and general fitness of the persons named in the articles of incorporation are such as to command confidence and warrant belief that the business of the proposed building and loan association will be honestly and efficiently conducted in accordance with the intent and purpose of this Act, and whether the public convenience and advantage will be promoted by allowing such proposed building and loan association to be incorporated and engaged in business, and whether the population in the neighborhood of such place and in the surrounding country affords a reasonable promise of adequate support for the proposed building and loan association. If it shall be satisfied concerning the several matters specified, the Banking Commissioner of Texas shall issue under his official seal a certificate reciting in substance the filing in its office of the articles of incorporation; that such articles conform to all requirements of the law, and that they have been approved. whereupon the persons named in the articles of association, their associates and successors, shall become

a corporate body for the period for which they were organized, and shall exercise such powers as are herein granted, and such other powers as are necessary to enable such association to carry out the purpose of its organization, not inconsistent with the provisions of this Act, but before such association shall proceed to do business it shall adopt and have approved by the Banking Commissioner of Texas by-laws for the regulation and management of its business, not inconsistent with the provisions herein provided. Acts 1929, 41st Leg., 2nd C. S., p. 100, ch. 61 § 2.

Repealed Acts 1963, Vernon's Texas Session Law Service, Ch. 113, pp. 269-301.

Vernon's Texas Session Law Service,
Acts 1963, 58th Leg., Ch. 113, pp. 269-301

"SAVINGS AND LOAN ACT

. . . .Section 1.01. This Act shall be known and may be cited as the 'Texas Savings and Loan Act.'

. . . . CHAPTER TWO. FORMATION OF ASSOCIATIONS

APPLICATION FOR CHARTER

Section 2.01. Application for a charter for a savings and loan association may be made by five (5) or more citizens of this State (hereinafter referred to as incorporators) by tendering to the Commissioner along with the proper filing fee, an application consisting of the following:

(1) Two (2) copies of Articles of incorporation for the proposed association stating (i) the name of the association, (ii) the site of the principal office and (iii) the names and addresses of the initial directors.

(2) A statement as to (i) the amount, if any, of Permanent Reserve Fund Stock which has been subscribed and paid for at the time of filing, (ii) the names and addresses of such subscribers and the amount subscribed by each, (iii) the amount of savings liability, if any, with which the association will commence business, (iv) the amount of paid-in surplus or expense fund with which the association will commence business.

(3) Two (2) copies of the bylaws under which the association proposes to operate.

(4) Statements, exhibits, maps and other data sufficiently detailed and comprehensive as to enable the Commissioner

to pass upon the matters set forth in Section 2.08(2), (3) and (4) of this Act and such other information in regard to the proposed association and its operation as may be required by duly promulgated rules and regulations of the Commissioner and the Building and Loan Section of the Finance Commission of Texas.

The Articles of incorporation and all statements of fact tendered to the Commissioner in connection with an application for charter shall be subscribed and sworn to under the sanction of an oath, or such affirmation as is by law equivalent to an oath, made before an officer authorized to administer oaths.

Permanent Reserve Fund Stock

Sec. 2.02. The charter of an association may provide for the issuance of Permanent Reserve Fund Stock. No other form or type of stock or shares shall be issued. Such Permanent Reserve Fund Stock, when issued, may not be retired or withdrawn except as hereinafter provided, until after all liabilities of the association shall have been satisfied in full, including the withdrawal value of all savings accounts. Such stock must be fully paid for in cash in advance of issuance and the association may not make any loans against the shares of such stock. Shares of such stock may have a par value of not less than One Dollar ($1) nor more than One Hundred Dollars ($100) each. An association authorized to issue such stock must have at all times issued and outstanding an amount thereof equal in par value to Twenty-five Thousand Dollars ($25,000) or two and one half per cent (2½%) of its gross assets whichever is greater but no association shall be required to have more than Two Hundred and Fifty Thousand

Dollars ($250,000) of the par value of such stock outstanding. Associations whose savings accounts are insured by the Federal Savings and Loan Insurance Corporation may retire in whole or in part any such stock heretofore issued when such associations are authorized to do so by a majority vote at any annual meeting of its members, or any special meeting of members called for such purpose; provided, that the basis of such retirement shall have been first approved by the Commissioner and consent to such retirement upon the part of the Federal Savings and Loan Insurance Corporation has been filed in writing with the Commissioner.

Stock requirements for proposed Permanent Reserve Fund stock associations

Sec. 2.03. Incorporators of proposed associations with authority to issue Permanent Reserve Fund Stock, as a prerequisite to the approval of an application for a charter shall be required to have subscribed and paid for in cash to the credit of the proposed association an aggregate amount of Permanent Reserve Fund Stock as the Commissioner shall specify within the limits set for such stock in the preceding Section. Such stock shall be issued within thirty (30) days from the date of incorporation.

Paid-in surplus requirements for Permanent Reserve Fund Stock associations

Sec. 2.04. As a prerequisite to approval of any application for a proposed association with authority to issue Permanent Reserve Fund Stock the Commissioner may require in addition to the amount paid in for such stock a paid-in surplus up to but not in excess of the aggregate amount

of the Permanent Reserve Fund Stock required under the preceding Section. Such paid-in surplus may be used in lieu of earnings to pay organization and operating expenses, dividends on savings accounts and to meet any loss reserve requirements. If the application should not be approved or if the proposed association does not proceed to do business, the stock subscriptions for Permanent Reserve Fund Stock and paid-in surplus shall be returned pro rata to the subscribers, less any lawful expenditures.

Savings account requirements for proposed associations without Permanent Reserve Fund Stock

Sec. 2.05. As a prerequisite to the approval of an application for a charter of an association without Permanent Reserve Fund Stock the incorporators must show to the satisfaction of the Commissioner subscribed and paid-in savings accounts in the following aggregate amounts in relation to the population of the community in which the home office of the association is to be located: (a) in communities having not more than ten thousand (10,000) inhabitants, the minimum sum of Fifty Thousand Dollars ($50,000); (b) in communities having more than ten thousand (10,000) but less than one hundred thousand (100,000) inhabitants, the minimum sum of One Hundred Thousand Dollars ($100,000); (c) in communities having one hundred thousand or more inhabitants, the minimum sum of Two Hundred Thousand Dollars ($200,000); provided, that the Commissioner may, in his discretion, require a larger amount to be paid in. The population of the community shall be determined by the Commissioner based upon the latest Federal census.

Expense fund requirements for proposed association without Permanent Reserve Fund Stock

Sec. 2.06. In addition to the savings account subscriptions required by the preceding Section the incorporators of an association without Permanent Reserve Fund Stock must show to the satisfaction of the Commissioner that an expense fund has been subscribed and paid into the credit of the proposed association equal to not less than fifty per cent (50%) of the minimum specified amount of required savings accounts set out in Section 2.05, from which expense fund the expense of organizing the association and its operating expenses in addition to such dividends as may be declared and paid or credited to its savings account holders may be paid until such time as its earnings are sufficient to pay same. The amounts so contributed to the expense fund shall not constitute a liability of the association except as hereinafter provided. Such contributions may be repaid pro-rata to the contributors from the net earnings of the association after provision for required loss reserve allocations and payment or credit of dividends declared on savings accounts. In case of the liquidation of an association before contributions to the expense fund have been repaid, any contributions to the expense fund remaining unexpended, after the payment of expenses of liquidation, all creditors, and the withdrawal value of all savings accounts shall be paid to the contributors pro-rata. The books of the association shall reflect such expense fund. Contributors to the expense fund shall be paid dividends on the amounts paid in by them and for such purpose such contributions shall in all respects be considered as savings accounts of the association.

Hearings on charter applications

Sec. 2.07. When a proper application for a charter has been filed, the Commissioner shall cause public notice of such application to be given and give any interested party an opportunity to appear, present evidence and be heard for or against such application.

Approval of application for charter

Sec. 2.08. The Commissioner shall not approve any charter application unless he shall have affirmatively found from the data furnished with the application, the evidence adduced at such hearing and his official records that:

(1) the prerequisites, where applicable, set forth in Sections 2.02, 2.03, 2.04, 2.05, and 2.06 have been complied with and that the Articles of incorporation comply with all other provisions of this Act;

(2) the character, responsibility and general fitness of the persons named in the Articles of incorporation are such as to command confidence and warrant belief that the business of the proposed association will be honestly and efficiently conducted in accordance with the intent and purpose of this Act and that the proposed association will have qualified full-time management;

(3) there is a public need for the proposed association and the volume of business in the community in which the proposed association will conduct its business is such as to indicate profitable operation;

(4) the operation of the proposed association will not unduly harm any existing association.

If the Commissioner so finds, he shall state his findings in writing and issue under his official seal a certificate of incorporation and deliver a copy of the approved Articles of incorporation and bylaws to the incorporators and retain a copy thereof as a permanent file of his office, whereupon the proposed association shall be a corporate body with perpetual existence unless terminated by law and may exercise the powers of a savings and loan association as herein set forth.

Refusal of charter application

Sec. 2.09. If the Commissioner is unable to make the findings as required by the preceding Section, he shall endorse upon each copy of the proposed Articles of incorporation the word 'refused' with the date of such endorsement and attach thereto a written statement of his grounds for such refusal. One copy of the proposed Articles and attached grounds of refusal shall be promptly mailed to the incorporators by certified mail.

Forfeiture of charter for failure to commence business

Sec. 2.10. Any association whose charter has been approved under this Act shall commence business within six (6) months after the date of such approval. If an association has not commenced business within such time, the incorporators may request a hearing before the Commissioner; and if good cause is shown for such failure, the Commissioner may grant a reasonable extension of the time for commencing business to give such association an opportunity to overcome the cause for the delay in commencing business. Failure to commence business as herein

required shall constitute grounds for forfeiture of the association's charter at the suit of the Attorney General upon request of the Commissioner brought in the County where the association proposes to locate its principal office.

Amendment of charter and bylaws

Sec. 2.11. Any association may, by resolution adopted by a majority vote of its members at any annual meeting or any special meeting called for such purpose, amend its charter or bylaws in any manner not inconsistent with the provisions of this Act; provided, that before such amendments become effective they must be filed with and approved by the Commissioner.

Corporate name; exclusive use by Associations

Sec. 2.12. The name of every association shall include either the words 'Savings Association,' or 'Savings and Loan Association.' These words shall be preceded by an appropriate descriptive word or words approved by the Commissioner. An ordinal number may not be used as a single descriptive word preceding the words 'Savings Association.' or 'Savings and Loan Association,' unless such words are followed by the name of the town, city or county in which the association has its home office. No certificate of incorporation of a proposed association having the same name as any other association authorized to do business in this State under this Act or a name so nearly resembling it as to be calculated to deceive shall be issued by the Commissioner, except to an association formed by the reincorporation, reorganization, or consolidation of other associations, or upon the sale of the property or

franchise of an association. No person, firm, company, association, fiduciary, partnership or corporation, either domestic or foreign, unless authorized to do business in this State under the provisions of this Act shall do business under any name or title which indicates or reasonably implies that the business is the character or kind of business carried on or transacted by an association or which is calculated to lead any person to believe that the business is that of an association. Upon application by the Commissioner or any association, a court of competent jurisdiction may issue an injunction to restrain any such entity from violating or continuing to violate any of the foregoing provisions of this Section.

Change of office or name

Sec. 2.13. No association shall, without the prior approval of the Commissioner (i) establish any office other than the principal office stated in its articles of incorporation, (ii) move any office of the association from its immediate vicinity or (iii) change its name. When his approval is applied for, the Commissioner shall give any person who might be affected an opportunity to be heard on the action proposed to be taken for which approval is sought.

Preference to local control

Sec. 2.14. In any instance where there is a conflict between an application for the approval of a charter for a new association and an application for the establishment of an additional office by an existing association both seeking to locate in the same community and the principal office of the existing association is located in a different

county than such community, the Commissioner may give additional weight to the application having the greater degree of control vested in or held by residents of the particular community.

* * *

Judicial review

Sec. 11.12. Any party with an interest in the subject matter thereof who is dissatisfied with any act, order, ruling or decision of the Commissioner taken or made, or with any rule or regulation promulgated by the Commissioner and the Building and Loan Section of the Finance Commission in connection with the administration of this Act, may secure judicial review thereof in the following manner:

(1) Venue.

(a) Proceedings for review of a removal order entered pursuant to Section 8.14 of this Act, may be instituted by filing a petition as in civil actions generally against the Commissioner, as defendant, either in a district court of Travis County, or in the district court of the county in which any person affected by such order resides or of the county in which the principal office of the association affected by such order is located.

(b) Proceedings for review of other acts, orders, rulings or decisions of the Commissioner or of any rule or regulation promulgated by the Commissioner and the Building and Loan Section of the Finance Commission may be instituted by filing a petition as in a civil action generally against the Commissioner, as defendant, in a district court of Travis County and not elsewhere.

(2) Time for Filing. Any petition for judicial review must be filed within thirty (30) days after the action, order, ruling or decision of the Commissioner is final or the rule or regulation complained of is promulgated.

(3) Stay of Enforcement. The filing of a petition for review shall not itself stay the effect of the act, order, ruling, decision or rule or regulation complained of, but the Commissioner or the reviewing court may order a stay upon appropriate terms and if a stay is so granted no supersedeas bond shall be required.

(4) Service of Process. The petition for review shall be served on the Commissioner and upon all parties of record in any hearing before the Commissioner in respect to the matter for which review is sought or upon the Commissioner alone if the matter for which review is sought is a rule or regulation promulgated in connection with the administration of this Act. After service of such petition upon the Commissioner and within the time permitted for filing an answer, the Commissioner shall certify to the District Court in which such petition is filed the record of the proceedings to which the petition refers. The cost of preparing and certifying such record shall be paid to the Commissioner by the petitioner and taxed as part of the cost in the case, to be paid as directed by the court upon final determination of said cause.

(5) Trial.

(a) The review of an order issued under Section 8.14 of this Act shall be tried in the same manner as civil actions generally and the complaining party shall be entitled to a jury. The trial shall be governed by the rules of civil

procedure and all fact issues material to the validity of such order shall be determined de novo on the preponderance of the evidence and the substantial evidence rule shall not apply. Any relevant and competent evidence shall be admissible for or against the order.

(b) The review of any other act, order, ruling or decision of the Commissioner or of any rule or regulation shall be tried by the court without a jury in the same manner as civil actions generally and all fact issues material to the validity of the Act, order, ruling, decision or rule or regulation complained of shall be redetermined in such trial on the preponderance of the competent evidence, but no evidence shall be admissible which was not adduced at the hearing on the matter before the Commissioner or officially noticed in the record of such hearing.

(6) Burden of Proof and Judgment. The burden of porof shall be on the plaintiff. The reviewing court may affirm the action complained of or remand the matter to the Commissioner for further proceedings.

(7) Appeals. Appeals from any final judgment may be taken by either party in the manner provided for in civil actions generally, but no appeal bond shall be required of the Commissioner.

* * *

Sec. 2. Repeal of Conflicting Laws.

(a) In connection with the general purpose of this Act the following Statutes and Acts, together with all laws or parts of laws in conflict herewith, are hereby repealed:

(1) Articles 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871,

872, 873, 874, 875, 876, 877, 878, 879, 880, 881 of Title 24, Revised Civil Statutes of Texas; Articles 1134, 1135, 1136, Penal Code of Texas, and all amendments to said Articles.

(2) Acts 1929, Forty-first Legislature, Second Called Session, page 100, Chapter 61, as amended Acts 1930, Forty-first Legislature, Fifth Called Session, page 193, Chapter 51; Acts 1931, Forty-second Legislature, page 53, Chapter 36; Acts 1931, Forty-second Legislature, page 320, Chapter 191; Acts 1931, Forty-second Legislature, page 331, Chapter 198; Acts 1932, Forty-second Legislature, Third Called Session, page 34, Chapter 18; Acts 1932, Forty-second Legislature, Third Called Session, page 32, Chapter 17; Acts 1935, Forty-fourth Legislature, page 159, Chapter 68; Acts 1939, Forty-sixth Legislature, Title: Building and Loan Associations, page 74, Chapter 1, page 76, Chapter 2, page 87, Chapter 3; Acts 1941, Forty-seventh Legislature, page 346, Chapter 188; Acts 1943, Forty-eighth Legislature, page 482, Chapter 323; Acts 1945, Forty-ninth Legislature, page 28, Chapter 18; Acts 1947, Fiftieth Legislature, page 348, Chapter 196; Acts 1947, Fiftieth Legislature, page 488, Chapter 285; Acts 1949, Fifty-first Legislature, page 486, Chapter 263; Acts 1949, Fifty-first Legislature, page 696, Chapter 363; Acts 1949, Fifty-first Legislature, page 966, Chapter 534; Acts 1951, Fifty-second Legislature, page 204, Chapter 119; Acts 1951, Fifty-second Legislature, page 233, Chapter 139; Acts 1953, Fifty-third Legislature, page 1028, Chapter 425; Acts 1957, Fifty-fifth Legislature, page 1319, Chapter 445 (Article 881a, Subdivision 1-69, Vernon's Civil Statutes of Texas).

(3) Acts 1949, Fifty-first Legislature, page 601, Chapter 319 (Article 811b, Vernon's Civil Statutes of Texas)."